STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2006
v	No. 258334 Wayne Circuit Court
CEDRIC RENAUD GILMORE, Defendant-Appellant.	LC No. 04-005032-01

Before: Sawyer, P.J., and Wilder and H. Hood*, JJ.

PER CURIAM.

We agree with the facts and analysis set out in the concurring opinion and adopt it as our own, with the exception of the concurrence's analysis on the Confrontation Clause issue under part IV.B.2 of the concurring opinion.

We agree with the concurrence's analysis in part IV.B.1 that the victim's statements were testimonial in nature and, therefore, are not admissible under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), unless an exception applies. But we do not believe that we can rely on the rule of forfeiture by wrongdoing under the facts of this case.

Crawford clearly accepts the proposition that the rule of forfeiture by wrongdoing is applicable under the Confrontation Clause. *Id*. at 62, citing *Reynolds v United States*, 98 US 145, 158-159; 25 L Ed 244 (1878). Indeed, this Court has recently applied that rule in *People v Bauder*, 269 Mich App ____; ____ NW2d ____ (No. 256186, issued 12/8/2005), to hold admissible statements by a victim made before her death. But there is a significant distinction between *Reynolds* and *Bauder* and the case bar. In neither *Reynolds* nor *Bauder* was the defendant's wrongdoing a contested issue in the determination of the defendant's guilt.

In *Reynolds*, the defendant was charged with bigamy in the Utah Territory. His alleged second wife was not available to testify due to the fact that the defendant had concealed her from being served with a subpoena to testify. The defendant's concealment of his wife was not an element to be proven to establish his guilt of bigamy.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The *Bauder* case is closer to the facts in the case at bar in that the defendant was on trial for murder. The victim's prior statements were admitted, the Court concluding that the victim's absence was due to the defendant's wrongdoing in killing her. But in *Bauder*, the defendant admitted killing the victim and merely contested at trial the "degree of guilt," that is, he argued that he was not guilty of a first-degree murder. *Id., slip op* at 6. This admission of the killing was also a prime factor in the case relied upon by *Bauder*, *United States v Garcia-Meza*, 403 F3d 364 (CA 6, 2005). In contrast, defendant in the case at bar denies having killed the victim.

Thus in those cases, the determination whether the defendant engaged in wrongdoing that caused the witness' absence at trial involved a fact not at issue, or at least not contested, in the determination of the defendant's guilt on the charged offense. In fact, in *Reynolds*, *supra* at 160, the Court noted that the burden had appropriately shifted to defendant to show that the defendant was not instrumental in causing the witness' absence. But in the case at bar, the determination that defendant engaged in the wrongdoing that procured the witness' absence from trial is the determination of a fact at issue in the question of defendant's guilt. This leads to circular reasoning: we can use the victim's statement because defendant caused the victim's death and we know that defendant caused the victim's death because the victim's statement tells us so. In short, we can justify the admission of the statement only by ignoring the presumption of innocence and concluding that defendant is, in fact, guilty of the charged offense. But defendant, having denied killing the victim and having exercised his right to jury trial, is entitled to be presumed innocent of killing the victim until the jury renders a verdict to the contrary. Permitting the use of the victim's statement in this instance would effectively and improperly shift the burden to defendant to prove his innocence. See *People v Meisel*, 293 Mich 51, 55; 291 NW 219 (1940).

Other courts have split on this issue. For example, in *United States v Mayhew*, 380 F Supp 2d 961, 968 (SD OH, 2005), the court concluded that it was not inappropriate to admit such a statement even where "the court determines by a preponderance of the evidence that the declarant is unable to testify because the defendant intentionally murdered her, regardless of whether the defendant is standing trial for the identical crime that caused the declarant's unavailability." The court noted that a defendant should not be permitted to profit from his wrongdoing and that the jury would never learn of the judge's preliminary finding. *Id.*

On the other hand, in *United States v Lentz*, 282 F Supp 2d 399, 426 (ED Va, 2002), the court concluded such a holding would violate the defendant's right to a jury trial and the presumption of innocence:

> Essentially, the Government asks the Court to find Defendant guilty of killing Ms. Lentz by a preponderance of the evidence in order to allow the evidence to be admitted to prove Defendant killed Ms. Lentz beyond a reasonable doubt. No case cited by the Government stands for this proposition. In this case for which Defendant is being tried under well settled Constitutional principles, Defendant is presumed to be innocent until proven guilty. To hold otherwise would be to deprive a defendant of his right to a jury trial and allow for a judge to preliminarily convict a defendant of the crime on which he was charged. This Court is unwilling to extend the reasoning in Rule 804(b)(6) to allow in the testimony of a decedent victim for whose death a defendant is on trial.

We agree with the reasoning in *Lentz*. It is one thing to allow in the evidence where the defendant has admitted to the killing and the trial is about the degree of responsibility. But to allow in the statement where the defendant denies doing the killing can only be done if the Court is willing to ignore the presumption of innocence and invade the province of the jury and make a preliminary finding of guilt. This we are unwilling to do. We are not willing to determine whether a defendant is entitled to a right guaranteed him by the Constitution based upon the trial judge's determination of a contested factual issue at trial.

While we follow *Lentz* and the concurrence follows *Mayhew*, we agree that defendant's convictions should be affirmed. We, however, do so on the basis that the trial court's error was harmless. There was additional evidence linking defendant to the crime, in particular the strong identification by the surviving victim. Accordingly, we conclude that, while the trial court erred in admitting the decedent's statement, that error was harmless beyond a reasonable doubt and defendant's convictions may be affirmed. *People v Anderson*, 446 Mich 392, 406; 521 NW2d 538 (1994).

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder